187 (2)

Supreme Court, U.S.
FILED
MAY 10 2011
OFFICE OF THE CLERK

No. 10-966

In the
Supreme Court of the United States

WILLIAM ROGER CLEMENS,
Petitioner,

v.

BRIAN McNAMEE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

Rusty Hardin
Counsel of Record
Joe Roden
Lara Hollingsworth
RUSTY HARDIN & ASSOCIATES, P.C.
1401 McKinney Street, Suite 2250
Houston, Texas 77010-4035
Telephone: 713-652-9000
Facsimile: 713-652-9800
rhardin@rustyhardin.com
jroden@rustyhardin.com
lhollingsworth@rustyhardin.com

Attorneys for Petitioner

May 10, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

I. Clemens Did Not Waive The Argument That His Claims Are Related To McNamee's Texas Contacts. 1

II. The Majority Opinion's Silent Rejection Of Controlling Authority Cannot Immunize Its Decision From Review. 2

III. The Majority Opinion Addressed—Incorrectly—The Nexus Test. 3

IV. McNamee's Texas Contacts Satisfy A Majority Of The Nexus Tests Used By Courts Of Appeals. 4

V. No Alternate Ground For Affirmance Exists Regarding The Defamatory Statement On Which Clemens Seeks Review. 6

VI. A Due Process Analysis That Turns On The False Content Of A Defamatory Statement Is Indefensible. 6

CONCLUSION 8

APPENDIX

Appendix 1: Brief of Appellant William Roger Clemens, United States Court of Appeals, Fifth Circuit (January 29, 2010) (excerpts) . . . 1a

Appendix 2: Brief of Appellee Brian McNamee, United States Court of Appeals, Fifth Circuit (March 12, 2010) (excerpts) . . . 15a

Appendix 3: Reply Brief of Appellant William Roger Clemens, United States Court of Appeals, Fifth Circuit (April 5, 2010) (excerpts) 19a

TABLE OF AUTHORITIES

Federal Cases:

Calder v. Jones,
465 U.S. 783 (1984) 6, 7

Clemens v. McNamee,
615 F.3d 374 (5th Cir. 2010) 2

Freedom Newspapers v. Cantu,
168 S.W.3d 847 (Tex. 2005) 5

Kauffman Racing Equip., L.L.C. v. Roberts,
930 N.E.2d 784 (Ohio 2010), *petition for cert. filed*, 2010 WL 4494141 (U.S. November 8, 2010) (No. 10-617) 8

O'Connor v. Sandy Lane Hotel Co., Ltd.,
496 F.3d 312 (3d Cir. 2007) 5

Articles:

Brilmayer, Lea, *Related Contacts and Personal Jurisdiction*,
101 HARV. L. REV. 1444 (1988) 5

David A. Elder, *Defamation: A Lawyer's Guide*
§ 7.3 (2010) 5

Respondent Brian McNamee implicitly concedes that the primary issue before the Court—the connection required between a plaintiff's claim and a nonresident defendant's forum contacts to permit the exercise of specific personal jurisdiction—is worthy of the Court's attention, but argues that this case is not the proper vehicle to address the issue. McNamee's arguments lack merit for several reasons.

I. Clemens Did Not Waive The Argument That His Claims Are Related To McNamee's Texas Contacts.

Clemens argued in the court of appeals that "the Due Process Clause permitted the district court to exercise personal jurisdiction over McNamee because . . . McNamee established 'minimum contacts' with Texas, and Clemens's claims arise from, or are directly related to, those contacts . . . ." Reply App. 10a. Clemens noted that his claims arose from or were related to, among other contacts, McNamee's Texas business contacts and McNamee's prior false statements made to Andy Pettitte while in Texas. *See* Reply App. 13a-14a.

McNamee argued in response that "McNamee's alleged contacts with Texas are unrelated to Plaintiff's claims and thus irrelevant." Reply App. 17a. In reply, Clemens argued that "Clemens's defamation claims all arise from or are related to McNamee's business contacts with Texas[]" and "Clemens' existing defamation claims based on McNamee's statements to the Mitchell Commission and SI.com arise from or are related to McNamee's false statements to Pettitte . . . ." Reply App. 23a. Finally, at oral argument, Clemens again argued that his claims are related to McNamee's

Texas contacts. *See Clemens v. McNamee*, No. 09-20265, Oral Argument at http://www.ca5.uscourts.gov/OralArgumentRecordings.aspx. Having raised the argument that his claims are related to McNamee's Texas contacts at every opportunity before the court of appeals, Clemens did not waive it.

II. The Majority Opinion's Silent Rejection Of Controlling Authority Cannot Immunize Its Decision From Review.

The majority opinion below expressly recognized that controlling authority stated the nexus test in the disjunctive: "Specific jurisdiction exists when 'the defendant has 'purposefully directed' his activities at residents of the forum . . . and the litigation results from alleged injuries that **arise out of or relate to** those activities.'" App. 6a (emphasis added). Nevertheless, without explanation and in the face of a multi-page dissent that focused on the "related to" prong of the nexus test, *see* App. 11a-26a, the majority opinion consciously pruned "or related to" from the nexus test: "In this case, the relevant contacts from which Clemens's cause of action **arises** are the allegedly defamatory remarks about Clemens which McNamee made to the Mitchell Commission and John Heyman of SI.com."[1] App. 6a-7a (emphasis added).

The majority's refusal to expressly acknowledge that it was rejecting one-half of the nexus test imposed

---

[1] Clemens repeatedly argued in the court of appeals that specific personal jurisdiction over McNamee in Texas was proper based on his Texas business contacts, his false statements to Pettitte while in Texas, and his false statements to SI.com and the Mitchell Commission. *See* Reply App. 4a-5a, 13a-14a, 20a-23a.

by controlling authority cannot insulate its decision from review as McNamee contends. *See* Opp. at 13-16. To the contrary, the majority's silent deviation from controlling authority is pernicious and highlights the need for review.

III. The Majority Opinion Addressed—Incorrectly—The Nexus Test.

McNamee's assertion that the majority opinion did not reach the issue of the connection required between a plaintiff's claims and a nonresident defendant's forum contacts is incorrect. *See* Opp. at 14-16. The majority found **only** that McNamee's defamatory statements to the Mitchell Commission and SI.com did not constitute purposeful availment:

> In this case, the relevant contacts from which Clemens' cause of action arises are the allegedly defamatory remarks about Clemens which McNamee made to the Mitchell Commission and John Heyman of SI.com. Therefore, the issue narrows to whether these defamatory remarks constituted purposeful availment such that McNamee could have reasonably anticipated being haled into a Texas court as a result of his statements.

App. 6a-7a. The majority never found that McNamee's Texas business contacts or his false statements to Pettitte in Texas did not constitute purposeful availment. The majority simply refused to engage the dissent on this issue. *See* App. 13a ("McNamee purposefully availed himself of conducting business in Texas.") (Haynes, J., dissenting).

The majority refused to consider McNamee's Texas business contacts and his false statements to Pettitte in Texas in its purposeful availment analysis because it implicitly found that those contacts were irrelevant. *See* App. 6a ("[T]he relevant contacts . . . are the allegedly defamatory remarks about Clemens which McNamee made to the Mitchell Commission and John Heyman of SI.com."). The majority found those contacts to be irrelevant because Clemens's claim did not "arise[]" from them. *See id.* ("[T]he relevant contacts from which Clemens' cause of action arises are the allegedly defamatory remarks about Clemens which McNamee made to the Mitchell Commission and John Heyman of SI.com."). Thus, the majority necessarily reached the issue of the connection required between a plaintiff's claims and a nonresident defendant's forum contacts. And when it reached the issue, the majority erred by applying only one-half of the nexus test.

IV. McNamee's Texas Contacts Satisfy A Majority Of The Nexus Tests Used By Courts Of Appeals.

Clemens identified at least five different nexus tests used by courts of appeals: (1) proximate cause or "arise out of;" (2) substantive relevance; (3) "meaningful link;" (4) but-for causation; and (5) substantial connection or "related to." Judge Catharina Haynes's dissent demonstrates that McNamee's Texas contacts satisfy the second, third, and fifth tests. *See* App. 12a-15a, 20a, 24a; Pet. at 21-23.

However, Judge Haynes's description of McNamee's Texas contacts omitted McNamee's previous false

statements to Pettitte in Texas that Clemens had used steroids and HGH. McNamee's prior false accusations in Texas are evidence of the actual malice element of Clemens's defamation claims, and also establish the substantive relevance and substantial connection/related to nexus tests.[2] *See O'Connor v. Sandy Lane Hotel Co. Ltd.*, 496 F.3d 312, 319 (3d Cir. 2007) ("Substantive relevance" "test examines whether any of the defendant's contacts with the forum are relevant to the merits of the plaintiff's claim.");[3] *Freedom Newspapers v. Cantu*, 168 S.W.3d 847, 858 (Tex. 2005) ("[A] personal vendetta demonstrated by a history of false allegations may provide some evidence of malice . . . ."); *see also* David A. Elder, *Defamation: A Lawyer's Guide* § 7.3 (2010) ("[T]he decisions generally hold that almost any evidence of common law malice may be *relevant and admissible* evidence on the constitutional actual malice issue . . . .").

---

[2] Although Clemens dismissed his defamation claims that were based on McNamee's false statements to Pettitte in Texas, the facts that formed the basis of those claims did not thereby disappear or become irrelevant. *See* App. 75a ¶ 6, 86a ¶ 36.

[3] The substantive relevance test determines relevance "from the point of view of some state law that would arguably govern the case. At this threshold point, one need not make a full-fledged choice of law determination: one need merely consider the laws reasonably vying for application." Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1456 (1988).

V. No Alternate Ground For Affirmance Exists Regarding The Defamatory Statement On Which Clemens Seeks Review.

McNamee's assertion that an "alternate ground for affirmance makes certiorari particularly inappropriate" is a red herring. *See* Opp. at 21-22. McNamee himself admits that the "alternate ground" applies only to McNamee's statements to the Mitchell Commission, and not to his statements to SI.com. *See id.* at 21 n.9. And Clemens's petition was clear that he was seeking review of personal jurisdiction over McNamee's statements to SI.com. *See* Pet. at 6. Thus, the "alternate ground" does not apply to the defamatory statement on which Clemens seeks review.

VI. A Due Process Analysis That Turns On The False Content Of A Defamatory Statement Is Indefensible.

With regard to Clemens's second issue, McNamee flees from the majority opinion's interpretation of the *Calder v. Jones*, 465 U.S. 783 (1984) "express aiming" requirement: "The court of appeals here did not say that Clemens could *only* satisfy *Calder* by" showing "a defamatory statement's reference to the plaintiff's forum activities or that the statement is drawn from forum sources." Opp. at 12. But that is exactly what the majority required:

> We read *Calder* as requiring the plaintiff seeking to assert specific personal jurisdiction over a defendant in a defamation case to show '(1) the subject matter of and (2) the sources

> relied upon for the article were in the forum state.'

App. 9a.

Recognizing the indefensibility of a due process analysis that turns on the false content of a defamatory statement, McNamee leaves it undefended. Instead, McNamee attacks a straw man—whether damage to Clemens in Texas by itself is sufficient to satisfy *Calder*. *See* Opp. at 8. But Clemens has never taken that position. Instead, Clemens has always contended that he satisfied *Calder*'s "express aiming" test because McNamee intentionally and tortiously published a defamatory statement about Clemens to SI.com, knowing that it would have a devastating impact on Clemens and that he would bear the brunt of that injury in Texas, where McNamee knew he lives, worked, and in which the statement would be widely circulated. This undisputed conduct is all that *Calder* itself requires to constitute "express aiming," even if some courts of appeals have tinkered with the test until it is unrecognizable. *See Calder*, 465 U.S. at 789-90; App. 22a ("[U]nder *Calder*, personal jurisdiction is appropriate over McNamee because McNamee knew that Clemens resided and worked in Texas and that Clemens would feel the brunt of the impact of the allegedly defamatory statements in Texas.") (Haynes, J., dissenting).

Although Clemens narrowly tailored the second issue in his petition to the conflict that exists among the circuit courts of appeals regarding the importance of the content of a defamatory statement to the specific personal jurisdiction analysis, this case also implicates a broader conflict identified in another case that is

pending before the Court. That case, *Roberts v. Kauffman Racing Equip., L.L.C.*, No. 10-167, presents the question whether *Calder*'s "express aiming" test is satisfied by a defendant's intentional tort involving the Internet while knowing the plaintiff's state of residence. The Court's resolution of *Roberts* will also likely impact the resolution of this case.

CONCLUSION

The writ should be granted.

Respectfully submitted,

Rusty Hardin
Joe Roden
Lara Hollingsworth
Counsel of Record
RUSTY HARDIN & ASSOCIATES, P.C.
1401 McKinney St., Suite 2250
Houston, Texas 77010
Telephone: 713-652-9000
Facsimile: 713-652-9800
rhardin@rustyhardin.com
jroden@rustyhardin.com
lhollingsworth@rustyhardin.com

Attorneys For Petitioner

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix 1: Brief of Appellant William Roger Clemens, United States Court of Appeals, Fifth Circuit (January 29, 2010) (excerpts) . . . 1a

Appendix 2: Brief of Appellee Brian McNamee, United States Court of Appeals, Fifth Circuit (March 12, 2010) (excerpts) . . . 15a

Appendix 3: Reply Brief of Appellant William Roger Clemens, United States Court of Appeals, Fifth Circuit (April 5, 2010) (excerpts) 19a

---

APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 09-20625

[Filed January 29, 2010]

WILLIAM ROGER CLEMENS Appellant	)
v.	)
BRIAN MCNAMEE Appellee	)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS

BRIEF OF APPELLANT WILLIAM ROGER CLEMENS

RUSTY HARDIN & ASSOCIATES, P.C.
Rusty Hardin
Joe Roden
Lara Hudgins Hollingsworth
1401 McKinney Street, Suite 2250
Houston, Texas 77002-5609

Telephone: 713-652-9000
Facsimile: 713-652-9800

**ATTORNEYS FOR APPELLANT
WILLIAM ROGER CLEMENS**

* * *

with prejudice the remainder of his claims that had not previously been dismissed. 6 ROA 1519; 9T ROA 1535-36.

STATEMENT OF FACTS

I. Clemens Has Substantial Ties To Texas.

Clemens has lived in Texas since 1977, when he moved here from Ohio with his mother and five siblings. RE 63 ¶ 11. He attended Spring Woods High School, San Jacinto Junior College, and the University of Texas, all in Texas. RE 64 ¶ 12. In 1983, Clemens led the Texas Longhorns to the national collegiate baseball championship. *Id.* Thereafter, the University of Texas honored Clemens by retiring his number. *See id.*

After completing his collegiate career, Clemens was drafted by the Boston Red Sox and made his major league debut in 1984. RE 64 ¶ 13. Clemens played for the Red Sox for thirteen years from 1984-1996. *See id.* Clemens then played with the Toronto Blue Jays from 1997-1998. RE 65 ¶ 15-16. In 1998 in Toronto, Clemens met McNamee, who was then an assistant trainer with the Blue Jays. *Id.* ¶ 16. Clemens was traded to the New York Yankees in 1999, and played

there from 1999-2003 and in 2007. RE 65 ¶ 18, 66 ¶ 20, 67-68 ¶ 23, 68-69 ¶ 27.

Although Clemens temporarily lived in Boston, Toronto, and New York during the baseball season while playing for the Red Sox, Blue Jays, and Yankees, respectively, he returned to his home in Houston, Texas at the end of each season where he permanently resides with his wife and four children. RE 68 ¶ 24. Texas is also home to Clemens's extended family. *Id.* Clemens's mother lived in Texas until her death, and his five siblings and seven of his nephews and nieces still reside in Texas. *Id.*

From 2004-2006, Clemens played for his home-town Houston Astros. RE 68-69 ¶¶ 25-27. During his first year with the Astros, Clemens won his seventh Cy Young award, climbed to second on the all-time strike-out list, and was named the starter on the National League All Star Team. RE 68 ¶ 25. Also during Clemens's first year with the Astros, their attendance climbed by more than 25% from the previous year. *See* 5 ROA 1020-23. During his second year with the Astros, Clemens led the major league in earned run average, and the Astros advanced to the World Series for the first time in history. RE 68 ¶ 26. During Clemens's third year with the Astros, their attendance again topped 3,000,000. *See* 5 ROA 1023.

Clemens is also engaged in business and charitable ventures in Texas. *See* RE 62-63 ¶ 9. Clemens is a trustee of the Roger Clemens Foundation, a Houston-based charity. *See id.* Clemens also has long-term personal services contracts with the Houston Astros and other Texas-based businesses. *See id.*

II. McNamee Has Conducted Significant Business In Texas.

According to McNamee, in 1999 he began traveling to Texas during baseball's off-season to train Clemens at his home in Houston. *See* RE 61 ¶ 5; 5 ROA 1035-36. McNamee would also train Pettitte, another Yankees pitcher, during his trips to Texas. RE 61 ¶ 5. From 1999-2007, McNamee traveled to Texas at least 30-38 times to train Clemens and/or Pettitte.[1] Each of McNamee's trips to Texas lasted approximately five days. RE 61 ¶ 5, 5 ROA 1029, 1034. Thus, McNamee spent approximately 150-190 days in Texas training Clemens and/or Pettitte.

McNamee also earned significant income as payment for training Clemens and Pettitte in Texas. RE 61 ¶ 5. For example, Pettitte has testified that he paid McNamee $62,000-$64,000 to serve as his full-time personal trainer in 2004. 5 ROA 1043; *see* RE 61 ¶ 5.

---

[1] By his own admission, McNamee traveled to Texas 2-3 times each year in 2000, 2001, 2002, 2003, 2005, 2006, and 2007, and 10 times in 2004, to train Clemens and/or Pettitte. *See* 2 ROA 246 ¶ 12. Thus, these trips totaled 24-31. However, in the deposition he gave Congress, McNamee testified that his trips to Texas to train Clemens began in 1999. *See* 5 ROA 1035. Thus, 2-3 more trips to Texas must be added to McNamee's total. Also, Pettitte testified in his deposition that in 2004 McNamee would travel to Texas during each homestand to train him. *See* 5 ROA 1051. The Houston Astros had 14 homestands during 2004. *See* 5 ROA 1053-60. Thus, another 4 trips must be added to McNamee's total. With those additions, McNamee's trips to Texas to train Clemens and/or Pettitte total 30-38.

Separate and apart from the training services he provided to Clemens and Pettitte in Texas, McNamee has also traveled to Texas twice as a trainer for the Yankees, once in 2000 and another time in 2001. 2 ROA 246 ¶ 11. McNamee spent a total of six days in Texas during those trips. *Id.*

III. McNamee Repeatedly Defamed Clemens By Falsely Accusing Him Of Using Steroids And HGH.

In 1999 or 2000, while at Clemens's Texas home to train him, McNamee falsely told Pettitte, a Texas resident, that Clemens, a Texas resident, had used human growth hormone ("HGH"). RE 72 ¶ 36; 1 ROA 219. Thereafter, in 2003 or 2004, while at Pettitte's Texas home to train him, McNamee falsely told Pettitte that Clemens had used steroids. RE ¶ 36, 5 ROA 1047-48. McNamee later repeated these false accusations that Clemens had used steroids and HGH to former United States Senator George Mitchell who was conducting a private investigation into the use of performance enhancing substances in Major League Baseball. *See* RE 70-71 ¶ 33; 5 ROA 1061-81. And shortly thereafter, McNamee again repeated his false accusation that Clemens had used steroids to John Heyman, a reporter for SI.com. RE 71-72 ¶ 35; 5 ROA 1085.

When he intentionally made his false accusations, McNamee knew: (1) Clemens was a Texas resident because McNamee had repeatedly traveled to Texas and stayed at Clemens's home while training him, *see* 5 ROA 1030-34, 1037; (2) Clemens had worked in Texas as a Houston Astro from 2004-2006, *see* RE 61 ¶¶ 5-6, 62-63 ¶ 9, 68-69 ¶¶ 25-27; (3) Clemens had

significant baseball and non-baseball related business interests in Texas, *see* RE 62-63 ¶ 9; 5 ROA 1038-39; (4) Clemens runs a charitable foundation in Texas that bears his name, RE 61-62 ¶ 6, 62-63 ¶ 9, 70-71 ¶ 33, 71-72 ¶ 35; (5) his false accusations would have a devastating impact on Clemens's reputation, mental status, and business interests in Texas; *see id.*; (5) the Mitchell Commission and SI.com would republish and widely circulate his false accusations in Texas, *see id.*; and (6) millions of Texas residents would read his false accusations against Clemens. *See id.*

McNamee's false accusations have in fact been circulated to millions of Texans. Virtually every major Texas newspaper and many smaller ones republished the false accusations McNamee made to the Mitchell Commission regarding Clemens. *See* 5 ROA 1088-1117. And a link to the Mitchell Report was immediately placed on dozens of websites, including MLB.com, the official website for Major League Baseball. *See id.* at 1118-20. MLB.com received over 19,000,000 visitors during the month the Mitchell Report was released. *See id.* at 1121-24. Similarly, the SI.com article was circulated to the approximately 16,000,000 Texas residents with Internet access. *See id.* at 1125-29.

It goes without saying that McNamee's false accusations have accomplished their purpose of destroying Clemens's good reputation and making him the subject of scorn and ridicule throughout Texas.

SUMMARY OF THE ARGUMENT

The district court erred by dismissing Clemens's defamation claims against McNamee for two reasons.

* * *

underneath the traditional umbrella of whatever privilege he might have been entitled to assert. These statements to private third parties simply were not made in the due course of a judicial proceeding. The district court, however, was persuaded to grant absolute immunity to the statements because the federal government compelled McNamee to make the public disclosure. Again though, there is no law supporting this application, and in fact giving absolute privilege to such compelled statements is dangerous and counter to the principles of justice.

Even if McNamee's compelled statements to a third party during a criminal investigation were made in the due course of a judicial proceeding (which they were not), a party must also show that the government compelled the statements in furtherance of the investigation. The district court refused to require McNamee to meet this standard, and McNamee wholly failed to prove it. In fact, the undisputed evidence clearly establishes that the Mitchell Commission would not and need not assist the federal authorities. Thus, compelling McNamee to speak to the Mitchell Commission did not further the federal investigation and thus the statements were not related to the alleged judicial proceeding.

ARGUMENT

I. The District Court Erred By Holding That It Lacked Specific Personal Jurisdiction Over McNamee.

"When a nonresident defendant presents a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing the district court's jurisdiction over the nonresident." *Stuart v. Spademan*, 772 F.2d 1185, 1192 (5th Cir. 1985). The plaintiff will meet his burden by presenting a *prima facie* case that personal jurisdiction is proper. *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162, 1165 (5th Cir. 1985).

In a diversity suit, a federal court has personal jurisdiction over a nonresident defendant to the same extent that a state court in that forum has jurisdiction. *See Bullion v. Gillespie*, 895 F.2d 213, 215 (5th Cir. 1990); FED. R. CIV. p. 4(e). The reach of this jurisdiction is limited by: (1) the state's long-arm statute; and (2) the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Bullion*, 895 F.2d at 215. Because the Texas long-arm statute extends to the limits of federal due process, this Court's two-step inquiry is reduced to an analysis of whether requiring McNamee to defend this lawsuit in Texas would violate due process.

The exercise of personal jurisdiction over a nonresident will not violate due process principles if two requirements are met. First, the nonresident defendant must have purposefully availed himself of the benefits and protections of the forum state by establishing "minimum contacts" with that forum

state. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Bullion*, 895 F.2d at 216. Here, only specific jurisdiction is at issue. Specific jurisdiction is appropriate when the nonresident defendant's contacts with the forum state arise from, or are directly related to, the cause of action. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n. 8 (1984); *Bullion*, 895 F.2d at 216. Second, the exercise of jurisdiction over the nonresident defendant must not offend "traditional notions of fair play and substantial justice." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987).

Importantly, "on a motion to dismiss for lack of jurisdiction, uncontroverted allegations in the plaintiff's complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits must be resolved in the plaintiff's favor for purposes of determining whether a *prima facie* case for personal jurisdiction exists." *Bullion*, 895 F.2d at 217. With few exceptions, McNamee did not controvert the jurisdictional facts alleged by Clemens in his Amended Complaint. In those rare instances when McNamee actually contradicted Clemens's jurisdictional allegations, Clemens submitted controverting evidence.[2] Consequently, Clemens's jurisdictional

---

[2] For example, McNamee's affidavit states that his contacts with Texas began in 2000, but he testified to the Committee on Oversight and Government Reform that he first began training Clemens in Texas in December 1999. *See* 5 ROA 1035. And McNamee's affidavit states that he did not know whether Senator Mitchell would publish a report, whether it would state that Clemens had used performance enhancing substances, or if any report would be disseminated publicly. However, the Commissioner of Baseball made it clear from the outset that he

allegations must be taken as true for purposes of this Court's personal jurisdiction analysis. *See id.*

As detailed below, the Due Process Clause permitted the district court to exercise personal jurisdiction over McNamee because: (A) McNamee established "minimum contacts" with Texas, and Clemens's claims arise from, or are directly related to, those contacts; and (B) exercising personal jurisdiction over McNamee in Texas would not offend "traditional notions of fair play and substantial justice."

A. McNamee Has Sufficient Contacts With Texas Because McNamee's Intentional Conduct Was Calculated To And Did Seriously Harm Clemens In Texas.

1. Specific Personal Jurisdiction Over McNamee Exists In Texas Under *Calder v. Jones*'s "Effects" Tests.

Calder v. Jones, 465 U.S. 783 (1984), is the seminal United States Supreme Court case addressing a forum's specific personal jurisdiction over an individual, nonresident defendant accused of defamation. In *Calder*, a California resident sued a Florida reporter and a Florida editor for libel, intentional infliction of emotional distress, and invasion of privacy following the publication of an

---

wanted the Mitchell Report made public, Senator Mitchell understood it was his responsibility to make public the information he learned, and McNamee knew that his false allegations against Clemens were included in the Mitchell Report before it was actually made public, giving him the chance to recant. *See* 5 ROA 1153, 1155.

article about her in a national publication, the *National Enquirer*, which was widely circulated in California and elsewhere. *See id.* at 784-85. A California superior court quashed the service of process on the reporter and editor for lack of personal jurisdiction. *See id.* at 785. A California court of appeals reversed the trial court's decision and announced the following "effects" test for personal jurisdiction:

> As the trial court observed, [the editor] did not enter California or even make telephone calls into the state in connection with his role in the preparation of the subject article; all of his acts with reference to that article apparently were performed in Florida. However, the requisite minimum contacts of a defendant with the forum state need not arise from his physical activity in that state. Every state has a natural interest in effects occurring within its territory, even if the act causing those effects was committed elsewhere. If a defendant commits an act or omission outside the forum state *with the intent* to cause a tortious effect within the state, the state may exercise jurisdiction over the defendant as to any cause of action arising from the effects. *The intent to cause tortious injury within the state when the tort actually occurs is generally a sufficient basis, without more, for the exercise of in personam jurisdiction*. The act may have been done with the intention of causing effects in the state. If so, the state may exercise the same judicial jurisdiction over the actor, or over the one who caused the act to be done, as to causes of action arising from these effects as it could have

> exercised if these effects had resulted from an act done within its territory. The complaint herein alleges that defendants, in publishing the defamatory article, acted maliciously and with the intent to injure plaintiffs. The general rule for defamation is that everyone who takes a responsible part in the publication is liable for the defamation. For the purpose of the determining whether a California court may assume jurisdiction over [the editor] in this lawsuit, it must be presumed that [the editor], in participating in the publication of the article as its editor, intended to cause injury to plaintiffs in California where they reside; such injury in fact occurred. Accordingly, a valid basis exists for California's exercise of personal jurisdiction over [the editor] with respect to the causes of action alleged herein.

Jones v. Calder, 187 Cal. Rptr. 825, 829 (Cal. Ct. App. 1982), *aff'd*, *Calder v. Jones*, 465 U.S. 783 (1984) (citations and quotations omitted) (emphasis in original).

In *Calder*, the United States Supreme Court expressly approved this "effects" test employed by the California court of appeals. *Calder*, 465 U.S. at 787 n.6. The court explained that "[a]n individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly caused the injury in California." *Id.* at 790. Moreover, the Supreme Court stated that the author and editor were "primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction is proper on that basis." *Id.* at 790. The Supreme Court affirmed the judgment of

the California Court of Appeals, "hold[ing] that jurisdiction over petitioners in California is proper because of their intentional conduct in Florida calculated to cause injury to respondent in California." *Id.* at 791 (emphasis added); *accord Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 400 (5th Cir. 2009) ("Under *Calder*, 'an act done outside the state that has consequences or effects within the state will suffice as a basis for jurisdiction in a suit arising from those consequences if the effects are seriously harmful and were intended or highly likely to follow from the nonresident defendant's conduct.'") (quoting *Guidry v. United States Tobacco Co.*, 188 F.3d 619, 628 (5th Cir. 1999)); *Kwik-Kopy Corp. v. Byers*, No. 01-20748, 37 Fed. Appx. 90, slip op. at 5 (5th Cir. May 9, 2002) ("[T]he Supreme Court in *Calder* clearly held that if intentional conduct is intended to cause injury in a specific state, that is sufficient to give specific jurisdiction to the courts of that state.").

McNamee's contacts with Texas present a much more compelling case for personal jurisdiction than did the editor's contacts with California in *Calder*. In *Calder*, the editor's only relevant contacts with California were visiting California twice (with neither trip related to the defamatory article), approving the initial evaluation of the subject of the article, editing the article in its final form, and refusing to print a retraction of the article. *See Calder*, 465 U.S. at 786.

Here, McNamee's contacts with Texas are much more extensive. McNamee: (1) contracted with two Texas residents, Clemens and Pettitte, to perform strength and conditioning trainer services in Texas; (2) traveled to Texas at least 30-38 times between 1999-2007 for 5 days at a time (totaling 150-190 days)

to train Clemens and Pettitte; (3) earned a substantial portion of his income from training Clemens and Pettitte in Texas; (4) falsely accused Clemens, a Texas resident, of using steroids and HGH while present in Texas to train Clemens and Pettitte; and (5) repeated his false accusations that Clemens had used steroids and HGH to the Mitchell Commission and SI.com, knowing that the accusations would be widely-circulated and cause serious injury to Clemens in Texas where McNamee knew Clemens lives, worked, and has significant business and charitable interests. Consequently, as in *Calder*, the exercise of personal jurisdiction over McNamee in Texas comports with due process.

* * *

APPENDIX 2

United States Court of Appeals
for the
Fifth Circuit

No. 09-20625

[Filed March 12, 2010]

WILLIAM ROGER CLEMENS,	)
	)
Appellant,	)
	)
– v. –	)
	)
BRIAN MCNAMEE,	)
	)
Appellee.	)
	)

APPEAL FROM THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION
CIVIL ACTION NO. 4:08-CV-00471
HONORABLE KEITH P. ELLISON

BRIEF OF APPELLEE BRIAN MCNAMEE

DAVID R. MILLER
DAVID R. MILLER, ATTORNEY AT LAW, PLLC
2777 Allen Parkway, 7th Floor
Houston, Texas 77019
Telephone: (713) 579-1568
Facsimile: (713) 579-1528

RICHARD D. EMERY
DEBRA L. GREENBERGER
EMERY CELLI BRINCKERHOFF & ABADY LLP
75 Rockefeller Plaza, 20th Floor
New York, New York 10019
Telephone: (212) 763-5000
Facsimile: (212) 763-5001
Admitted pro hac vice

EARL WARD
75 Rockefeller Plaza, 20th Floor
New York, New York 10019
Telephone: (212) 763-5000
Facsimile: (212) 763-5001
Admitted pro hac vice

Attorneys for Appellee Brian McNamee

March 12, 2010

* * *

residence. *Revell*, 317 F.3d at 473-75 (emphasis added; looking to and approving of *Reynolds*, 23 F.3d 1110, *Young*, 315 F.3d 256, and *Remick*, 238 F.3d 248).

These holdings are wholly in line with Supreme Court precedent which requires that the due process jurisdictional inquiry focus on the defendant and his purposeful availment of the forum —what did the defendant do that opened him up to suit in the forum state—instead of merely the "fortuity" of where plaintiff lived or the defendant's knowledge of that fact. *Burger King*, 471 U.S. at 478 (mere foreseeability of causing injury in another state is not a "sufficient benchmark" for exercising personal jurisdiction). Where, as here, McNamee's statements did not involve the forum state and did not rely on Texas sources, he could not have expected to be haled into court here.

c) McNamee's Alleged Contacts with Texas Are Unrelated to Plaintiff's Claims and Thus Irrelevant

Irrelevant to this analysis are McNamee's business contacts with Texas; such contacts are only relevant to an assertion of general jurisdiction. But here Plaintiff has specifically waived any claim of general jurisdiction. *See* App. Br. 12. Clemens's repeated and extensive recitations describing McNamee's purported business contacts with Texas, *see* App. Br. 5-6, 17, 22, 25, are collateral and seem calculated to distract from the question at hand: Specific jurisdiction arises only when the defendant's contacts with the forum "arise from, or are directly related to, the cause of action." *Revell*, 317 F.3d at 470. As the Fifth Circuit has made

clear, for "specific jurisdiction we look *only* to the contact out of which the cause of action arises." *Id.* at 472 (emphasis added).

In *Revell* the defamation claim arose from "the maintenance of the [Columbia University] internet bulletin board." *Id.* In analyzing defendant's minimum contacts, this Court therefore only looked to the "bulletin board" component of Columbia's website and not other portions of Columbia's website that could constitute contacts with Texas: "[s]ince the defamation action does not arise out of the solicitation of subscriptions or applications by Columbia, those portions of the website *need not be considered*." *Id.* (emphasis added). Accordingly, Clemens's attempt to distinguish *Revell* on that ground, claiming that "unlike the defendant in *Revell* who had never visited or conducted business in Texas, McNamee has been to Texas many times," must fail, as this distinction is immaterial. App. Br. 22. Clemens's repeated references to McNamee's occasional visits to Texas is legally irrelevant.

d) Clemens's Authority is not to the Contrary

Clemens cites not a single case from this Circuit in which a court has asserted jurisdiction over a defamation defendant where the alleged defamatory statements involved out-of-state activities. This is no oversight; the case law supports Defendant. Clemens decries this binding case law as unfair, claiming that it "would perversely twist due process to permit McNamee to defeat jurisdiction"

* * *

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 09-20625

[Filed April 5, 2010]

WILLIAM ROGER CLEMENS Appellant	)
v.	)
BRIAN McNAMEE Appellee	)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS

REPLY BRIEF OF
APPELLANT WILLIAM ROGER CLEMENS

RUSTY HARDIN & ASSOCIATES, P.C.
Rusty Hardin
Joe Roden
Lara Hudgins Hollingsworth
1401 McKinney Street, Suite 2250
Houston, Texas 77002-5609

Telephone: 713-652-9000
Facsimile: 713-652-9800

**ATTORNEYS FOR APPELLANT
WILLIAM ROGER CLEMENS**

* * *

B. Clemens Does Not Rely Exclusively On The Harm He Suffered In Texas To Establish Personal Jurisdiction Over McNamee In Texas.

McNamee repeatedly asserts that Clemens relies exclusively on the harm he suffered in Texas to establish personal jurisdiction over McNamee in Texas. *See* McNamee Br. at 12, 13. McNamee mischaracterizes Clemens's position.

Clemens relies on numerous McNamee contacts with Texas to establish personal jurisdiction over him in Texas, including the fact that McNamee: (1) contracted with two Texas residents, Clemens and Andy Pettitte, to perform strength and conditioning trainer services in Texas; (2) traveled to Texas at least 30-38 times between 1999-2007 for 5 days at a time (totaling 150-190 days) to train Clemens and Pettitte; (3) earned a substantial portion of his income from training Clemens and Pettitte in Texas; (4) falsely accused Clemens, a Texas resident, of using steroids and HGH while present in Texas to train Clemens and Pettitte; (5) intentionally and maliciously repeated those false accusations to the Mitchell Commission and SI.com, knowing that the accusations would be widely-circulated and cause serious injury to Clemens in Texas where McNamee knew Clemens lives,

worked, and has significant business and charitable interests; and (6) caused devastating injury to Clemens in Texas. In light of these extensive contacts, McNamee should have reasonably anticipated being haled into a Texas court to answer for his conduct.

C. McNamee's Business Contacts With Texas Are Relevant To The Specific Personal Jurisdiction Inquiry.

McNamee argues that his business contacts are irrelevant to the specific personal jurisdiction inquiry. *See* McNamee Br. at 15 n.6, 31-32. McNamee's invitation to ignore his extensive business contacts with Texas should be declined. Clemens's defamation claims all arise from or are related to McNamee's business contacts with Texas. But even if Clemens's defamation claims did not arise from or were not related to McNamee's business contacts with Texas, those contacts would still be relevant under *Calder*'s "effects test":

> Whether a state has judicial jurisdiction over one who by an act done outside the state causes an effect within the state may depend upon a variety of factors. Of significance are the extent of the relationship of the state to the defendant . . . . **The closer the defendant's relationship to the state, the greater is the likelihood that the state may exercise judicial jurisdiction over him as to claims arising from the effects of the act in the state. . . . So if the defendant does business in the state, . . . there is a greater likelihood that the state may exercise judicial jurisdiction over him as to claims**

> **arising from the effects in the state of an act done by him outside the state than if the defendant did not have this relationship to the state. This is so even though the defendant's relationship to the state is not related in any way to the act or to such of its effects in the state as are involved in the suit.**

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 cmt c (1988) (emphasis added);[1] *see Calder*, 465 U.S. at 786 (describing two trips editor made to the forum as "relevant contacts" even though they were not related to the plaintiff's defamation claim).

D. McNamee's False Accusations Against Clemens In Texas Are Relevant To The Personal Jurisdiction Inquiry.

While present in Texas to train Clemens and Pettitte, McNamee falsely told Pettitte that Clemens used steroids and HGH. RE 72 ¶ 36; 1 ROA 219; RE ¶ 36; 5 ROA 1047-48. McNamee asserts that these contacts with Texas are irrelevant to the personal jurisdiction inquiry because Clemens dismissed his

---

[1] The United States Supreme Court in *Calder* relied on the Restatement (Second) of Conflict of Laws § 37 in applying the "effects test" for personal jurisdiction. *See Calder*, 465 U.S. at 789. In addition, the Restatement (Second) of Conflict of Laws § 37 was also the primary authority relied on by the California court of appeals below. *See Jones v. Calder*, 187 Cal. Rptr. 825, 829 (Cal. Ct. App. 198), *aff'd*, *Calder v. Jones*, 465 U.S. 783 (1984). Finally, this Court has also extensively relied on Restatement (Second) Conflict of Laws § 37 in applying the "effects test." *See Guidry v. United States Tobacco Co.*, 188 F.3d 619, 629-30 (5th Cir. 1999).

defamation claims that were based on those false statements. *See* McNamee Br. at 34-35. McNamee is wrong because Clemens's existing defamation claims based on McNamee's statements to the Mitchell Commission and SI.com arise from or are related to McNamee's false statements to Pettitte—the false statements to the Mitchell Commission and SI.com are identical to and merely repeat the same false statements that McNamee previously made to Pettitte while in Texas. Clemens's voluntary dismissal of his defamation claims that were based on McNamee's false statements to Pettitte in Texas does not cause the facts that formed the basis of those claims to disappear or become irrelevant.[2]

E. McNamee "Expressly Aimed" His Tortious Conduct At Texas.

McNamee asserts that he did not "expressly aim" his tortious conduct at Texas. *See* McNamee Br. at 22-24. To the contrary, as in *Calder*, McNamee "expressly aimed" his tortious conduct at Texas because he (1) intentionally and maliciously made false statements to the Mitchell Commission and SI.com, knowing that the false accusations would be widely-circulated in Texas, and (2) caused devastating injury to Clemens in Texas, where McNamee knew Clemens would feel the brunt of the harm because he knew that Clemens lives, worked, and has significant business and charitable interests in Texas. *See* RE 21 (district

---

[2] McNamee mistakenly asserts that the district court dismissed as insufficiently pleaded Clemens's defamation claims that were based on McNamee's false statements to Pettitte. *See* RE 36; 6 ROA 1519; 9T ROA 1535-36.

court found that "McNamee knew Clemens would feel the brunt of the harm from his statements in Texas"); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 150 cmt. e (recognizing that a plaintiff suffers his greatest injury from a multistate defamatory communication in the state of his domicile).

The Court in *Calder* noted that such conduct is precisely the type that is "expressly aimed" at the forum state:

> [The defendants] intentional, and allegedly tortious, actions were **expressly aimed** at California. **[The author] wrote and [the editor] edited an article that they knew would have a potentially devastating impact upon [the plaintiff]. And they knew that the brunt of that injury would be felt by [the plaintiff] in the State in which she lives and works and in which the *National Enquirer* has its largest circulation.** Under the circumstances, [the defendants] must 'reasonably anticipate being haled into court there' to answer for the truth of the statements made in their article.

Calder, 465 U.S. at 789-90 (emphasis added).

The fact that, in addition to their wide circulation in Texas, McNamee's statements were also circulated nationally does not diminish the fact that the statements about Clemens were directed at Texas. *See Arthur v. Stern*, No. H-07-3742, 2008 WL 2620116, at *13 (S.D. Tex. June 26, 2008) (Rosenthal, J.) ("The fact that the interview was broadcast in other states does not diminish the fact that the statements about [the

plaintiff] were directed at Texas and had foreseeable effects there."); *Gordy v. Daily News, L.P.*, 95 F.3d 829, 833-34 (9111 Cir. 1996) ("Surely if some New York entity had written only 13 defamatory letters and sent them all to California, we would permit a defamed California resident to sue the entity in California. It is not clear why the distribution of 13 to 18 defamatory copies of a column loses magnitude as a contact simply because the Daily News does a lot of other things elsewhere."); *see also Guidry*, 188 F.3d at 626, 628-30 (stating that communications made in national publications circulated in Louisiana and on national television broadcast into Louisiana were "knowingly initiated and aimed" at consumers in Louisiana).

* * *